Cheu Kuok King v Jurudaya Construction Sdn Bhd

HIGH COURT (KUCHING) — SUIT NO KG 95 OF 1992 (II)
LAU BEE LAN J
15 JANUARY 2007

Contract — Agreement — Distribution arrangement — Plaintiff seeks to exit from the defendant company as a shareholder and director — Minutes of the meeting recorded and signed by parties — Whether minutes of meeting can be construed as a contract which was irrevocable

Trusts and Trustees — Trusts — Trust deeds — Difference in the date in the trust deed and the memorandum of transfer — Whether fatal

The defendant is a private registered company incorporated in 1979. The plaintiff was involved in the defendant as one of its previous directors and shareholders. Sometime in 1990, the plaintiff wanted to leave the defendant company as a shareholder and director. Therefore, on 9 August 1990 at 9am, a directors and shareholders meeting was convened to discuss the distribution of the defendant's assets in view of the parties' intention to retire from the defendant company. The plaintiff now claims, inter alia: (i) that the defendant may be ordered to discharge the trust property from Bank of Commerce Kuching Branch and transfer the trust property to the plaintiff forthwith free from all legal encumbrances at the defendant's cost and expenses; (ii) for an account of the rents, profits, interest and income received by the defendant or for the use of the defendant of the trust property since 9 August 1990; and (iii) damages. This case revolves around the following material documents namely, the minutes of meeting held on 9 August 1990 when the distribution of assets were discussed, the first trust deed (undated) signed by the defendant, the second trust deed dated 1 November 1991 signed and sealed by the defendant, the first agreement dated 17 July 1991 between the plaintiff and PW3 (the common solicitor appointed by all the parties to facilitate the meeting) and the second agreement dated 17 July 1991 (deed of indemnity) between the plaintiff and PW3. The issues before the court, basically are: (i) whether there is a valid trust created under the distribution arrangement reached at the meeting held on 9 August 1990; and (ii) whether, if there was a valid trust created, the same has varied or superseded the 1990 distribution arrangement and/or has been expressly or impliedly revoked by the subsequent agreement signed in 17 July 1991. It is the contention of the plaintiff that the minutes of the meeting held on 9 August 1990 is a binding agreement by virtue of the words 'irrevocable, conclusive and there shall be no further disputes' appearing therein.

Held, dismissing plaintiff's claim with costs to be taxed:

(1) Although DW1 agreed the 1990 distribution agreement has recorded the

entire contents of the 1990 meeting, he qualified it by saying 'but it has been made void by another agreement between myself and Cheu Kuok King' (the plaintiff). The minutes of the meeting recorded on 9 August 1990 was not a binding agreement but rather as pointed out by the learned counsel for the defendant, 'an accurate record of the distribution arrangement reached between the parties'. It was true that the parties signed the minutes of the meeting but this did not go so far as to construe the distribution arrangement as a contract which was irrevocable (see paras 6-7).

(2) The plaintiff's submission on the binding effect of the 'distribution agreement' was not an issue because the defendant's stance was, not that it was not bound, but rather there was no valid trust under the distribution arrangement and alternatively, even if there was a trust, it had been expressly or impliedly revoked in 1991 (see para 7).

(3) Premised on the authority of *Koperasi Wanita Sarawak Bhd & Anor v Robert Sim Teck Hock* [2005] 4 MLJ 493, the purported trust was not one by transfer, rather was created by declaration; secondly, there was an absence of one of the three prerequisites of a valid trust ie there was no certainty of subject. Based on the evidence from PW3, the common solicitor who prepared the second trust deed, it was undeniable that whilst the second trust deed was dated 1 November 1991, the memorandum of transfer was dated 31 October 1991 and registered on 2 November 1991, he could not account for the difference in the dates. The difference in the date in the second trust deed and the memorandum of transfer is crucial. It means that on 1 November 1991 the defendant was not the registered owner of Lot 199 yet as the registration of the memorandum of transfer only took place on 2 November 1991, albeit a difference of only a day. Since Lot 199 has not been vested in the defendant completely at the time the second trust deed was created, the second trust deed was not completely constituted and thus the purported declaration of trust was ineffective, null and void (see para 20).

[Bahasa Malaysia summary

Defendan adalah sebuah syarikat persendirian berdaftar yang didaftarkan pada 1979. Plaintif telah terlibat dengan defendan sebagai seorang pengarah dan pemegang saham yang lepas. Pada 1990, plaintif ingin keluar daripada syarikat defendan sebagai seorang pemegang saham dan pengarah. Oleh itu, pada 9 Ogos 1990 pada pukul 9 pagi, satu mesyuarat pengarah-pengarah dan pemegang-pemegang saham telah bersidang untuk membincangkan pembahagian aset-aset defendan memandangkan keinginan pihak-pihak untuk bersara daripada syarikat defendan. Plaintif kini menuntut, antara yang lain: (i) defendan diperintahkan melepaskan harta amanah daripada Bank of Commerce Cawangan Kuching dan memindahkan harta amanah kepada plaintif dengan segera bebas daripada sekatan undang-undang di atas kos dan perbelanjaan defendan; (ii) untuk satu akaun sewaan, keuntungan, faedah dan pendapatan yang diterima oleh defendan atau untuk kegunaan defendan harta amanah tersebut semenjak 9 Ogos 1990; dan (iii) gantirugi. Kes ini berkisarkan atas dokumen yang material iaitu, minit mesyuarat yang diadakan pada 9 Ogos 1990 apabila pembahagian aset-aset dibincangkan, suratikatan amanah pertama

(yang tidak bertarikh) ditandatangani oleh defendan, suratikatan amanah kedua bertarikh 1 November 1991 ditandatangani dan dimeteraikan oleh defendan, perjanjian pertama bertarikh 17 Julai 1991 di antara plaintif dan PW3 (peguamcara bersama yang dilantik oleh kesemua pihak-pihak untuk memudahkan mesyuarat tersebut) dan perjanjian kedua bertarikh 17 Julai 1991 (suratikatan indemniti) di antara plaintif dan PW3. Isu-isu di hadapan mahkamah, adalah: (i) sama ada terbentuk satu amanah yang sah di bawah penyusunan pembahagian yang dicapai di mesyuarat yang diadakan pada 9 Ogos 1990; dan (ii) sama ada, jika terbentuknya satu amanah yang sah, ianya telah diubah atau digantikan dengan penyusunan pembahagian 1990 dan/atau telah dengan nyata atau tersirat dibatalkan oleh perjanjian selepas itu yang ditandatangani pada 17 Julai 1991. Adalah penegasan plaintif bahawa minit mesyuarat yang diadakan pada 9 Ogos 1990 adalah perjanjian yang mengikat yang disebabkan oleh perkataan-perkataan 'irrevocable, conclusive and there shall be no further disputes' yang terkandung di dalamnya.

Diputuskan, menolak tuntutan plaintif dengan kos untuk ditaksirkan:

(1) Walaupun DW1 bersetuju bahawa perjanjian pembahagian bertarikh 1990 telah merekodkan keseluruhan kandungan mesyuarat 1990 tersebut akan tetapi beliau mensyaratkannya dengan menyatakan 'but it has been made void by another agreement between myself and Cheu Kuok King' (plaintif tersebut). Minit mesyuarat yang direkodkan pada 9 Ogos 1990 bukannya satu perjanjian yang mengikat tetapi seperti yang dikatakan oleh peguamcara defendan yang bijaksana 'an accurate record of the distribution arrangement reached between the parties'. Ia adalah benar bahawa pihak-pihak menandatangani minit mesyuarat tersebut tetapi ia tidak boleh ditafsirkan bahawa perjanjian pembahagian tersebut adalah satu kontrak yang tidak boleh dibatalkan (lihat perenggan 6–7).

(2) Hujahan plaintif atas kesan yang mengikat perjanjian pembahagian tersebut bukannya satu isu kerana kedudukan defendan ialah, bahawa bukan ia tidak mengikat, tetapi tiada amanah yang sah di bawah perjanjian pembahagian tersebut dan secara alternatif, walaupun terdapatnya satu amanah, ia telah dibatalkan secara nyata atau tersirat pada tahun 1991 (lihat perenggan 7).

(3) Berdasarkan autoriti *Koperasi Wanita Sarawak Bhd & Anor v Robert Sim Teck Hock* [2005] 4 MLJ 493, amanah yang dikatakan itu bukannya melalui pindahmilik, tetapi dibentuk melalui deklarasi; kedua, terdapat kekurangan salah satu daripada tiga keperluan untuk satu amanah yang sah iaitu tiada kepastian subjek. Berdasarkan keterangan PW3, peguamcara bersama yang menyediakan suratikatan amanah kedua, adalah tidak boleh dinafikan bahawa walaupun suratikatan amanah kedua bertarikh 31 Oktober 1991 dan didaftarkan pada 2 November 1991 beliau tidak dapat menerangkan tarikh-tarikh yang berlainan tersebut. Tarikh yang berlainan di suratikatan amanah kedua dan memorandum pindahmilik adalah penting. Ia bermakna bahawa pada 1 November 1991 defendan masih bukan pemilik berdaftar Lot 199 oleh kerana memorandum pindahmilik hanya berlaku pada 2 November 1991, walaupun perbezaannya satu hari sahaja. Oleh kerana Lot 199 belum lagi diletakhak pada defendan sepenuhnya pada masa

A suratikatan amanah kedua dibentuk, suratikatan kedua tidak terbentuk dengan sepenuhnya dan dengan itu deklarasi amanah yang dikatakan itu tidak berkesan, terbatal dan tidak sah (lihat perenggan 20).]

Notes

B For cases on agreement generally, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2132–2142

For a case on trust deeds, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) para 2335

Cases referred to

C *Fry, Re* [1946] Ch 312

Koperasi Wanita Sarawak Bhd & Anor v Robert Sim Teck Hock [2005] 4 MLJ 493 (refd)

Lee Eng The & Ors v Teh Thiang Seong & Anor [1967] 1 MLJ 42 (refd)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 779 (refd)

Milroy v Lord [1862] 4 De GF & J 264; 45 ER 1185 (refd)

D *Ooi Boon Leong & Ors v Citibank NA* [1984] 1 MLJ 222 (refd)

Rose, Re [1952] Ch 499 (refd)

Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd [2005] 4 MLJ 101 (refd)

Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd & Ors [2001] 1 MLJ 324 (refd)

E *Vandervell's Trusts (No 2), Re* [1974] Ch 269 (refd)

Wan Salimah bte Wan Jaffar v Mahmood bin Omar (Anim bte Abdul Aziz, Intervener) [1998] 5 MLJ 162 (refd)

Yeong Ah Chee v Lee Chong Hai & Anor and other appeals [1994] 2 MLJ 614 (refd)

F *Victor Ng (Tang & Partners) for the plaintiff.*

James Lo (George Lo & Partners) for the defendant.

Lau Bee Lan J:

G

[1] Vide its statement of claim dated 24 September 1992, the plaintiff claims, inter alia:

(i) that the defendant may be ordered to discharge the trust property from Bank of Commerce Kuching Branch and transfer the trust property to the plaintiff H forthwith free from all legal encumbrances at the defendant's costs and expenses;

(ii) for an account of the rents, profits, interest and income received by the defendant or for the use of the defendant of the trust property since 9 August 1990;

I (iii) damages;

(iv) interest at such rate and for such period of time as this honourable court shall deem fit; and

(v) further or other reliefs.

[2] In the plaintiff's closing submission (post-trial) dated 28 October 2005 (encl 211), in respect of item (i) above, the plaintiff prayed for an additional prayer to impose a 60 days time frame for the defendant to transfer Lot 199 to the plaintiff based on item 7(v) of the statement of claim and the plaintiff abandoned its prayer on item (ii) above.

[3] Chronologically, this case revolves around the following material documents namely, the minutes of meeting held on 9 August 1990 when the distribution of assets were discussed, the first trust deed (undated) signed by the defendant (exh D1, pp 1-2), the second trust deed dated 1 November 1991 signed and sealed by the defendant (exh P1, pp 1–2), the first Agreement dated 17 July 1991 between the plaintiff and PW3 (exh D1, pp 21–23) and the second agreement dated 17 July 1991 (Deed of Indemnity) between the plaintiff and PW3 (exh D1, pp 24–26). The issues before the court, basically are:

(i) whether there is a valid trust created under the distribution arrangement reached at the meeting held on 9 August 1990; and

(ii) whether, if there was a valid trust created, the same has varied or superseded the 1990 distribution arrangement and/or has been expressly or impliedly revoked by the subsequent agreement signed in 17 July 1991.

[4] Based on the evidence of the plaintiff, Cheu Kuok King (PW1), the defendant is a private registered company incorporated some time in 1979 (exh P3, p 1), principally involved in civil engineering works and general building contracts. The plaintiff was involved in the defendant as one of its previous directors and shareholders. The plaintiff's shareholding of the defendant then was approximately 30.7% of the entire company. The plaintiff has since resigned as a co-director of the defendant. Sometime in 1990, the plaintiff wanted to exit from the defendant Company as a shareholder and director. Therefore, on 9 August 1990 at 9am, a directors and shareholders meeting was convened on the second Floor, Lot 203, Section 11, Jalan Satok wherein Mazelan Bugo (as he then was), Chang Yi Ping and the plaintiff were all present to discuss the distribution of the defendant's assets in view of the parties' intention to retire from the defendant company. There were two observers who were sitting in the meeting by invitation, namely, Steven Yong and Patrick Wong Han Yong (PW3), the latter being the common solicitor appointed by all the parties to facilitate the meeting. At the meeting, the distribution of the defendant's assets was being discussed amongst the co-directors and shareholders then. Minutes of the Meeting was recorded by Steven Yong and which was reduced into writing and a copy of the minutes is exhibited as exh P1, pp 5 to 11A. As part of a package deal for the plaintiff in the distribution of assets process, it was agreed by all the directors and shareholders then that the plaintiff was to transfer his remaining shares in the defendant to Mazelan Bugo upon the compliance with all the terms or distribution of assets provided in the minutes of the meeting plus the plaintiff was to be liable for 30.7% of the Old Jurudaya's liabilities. In return, amongst other assets, Lot 199 Section 11 KTLD was to be transferred to the plaintiff for RM1 on the following conditions:

(a) The defendant shall be responsible to settle the account with the Bank of Commerce Bhd in respect of the Charge in escrow within a period of six months from the date hereto;

(b) plaintiff shall pay Chang Yi Ping the sum of RM86,622 within six months from the date hereof;

(c) plaintiff shall give an undertaking to be responsible for 30.7% of any shortfall of Old Jurudaya's liabilities by security of the above shophouse lot no 199, Section 11 KTLD, Jalan Kulas;

(d) the defendant shall by virtue of the undertaking referred to in (c) above be entitled to lodge a caveat as security;

(e) the defendant shall either nominate the plaintiff as the nominee for the transfer of the said Lot 199 which nomination shall be served on WAB Keluarga Realty Sdn Bhd or the defendant shall execute a registerable memorandum of transfer to the plaintiff on the said Lot 199;

(f) all charges in respect of each and every transfer shall be borne solely by the transferee in their respective transfer;

(g) with immediate effect, all rental income or other income derived from the said Lot 199 shall be paid to or received by the plaintiff or the plaintiff's nominee;

(h) the defendant shall execute or cause to be executed the necessary deed of assignment assigning the rights and obligations for all tenancy agreements in respect of Lot 199 to the plaintiff and to deliver all tenancy agreements thereto to the plaintiff forthwith. In lieu of the deed of assignment, any rental income derived from the said Lot 199 received by the defendant from the tenants shall be paid to the plaintiff within seven days from the date of the defendant receiving it;

(i) all the parties herein shall execute all the necessary documents herein abovementioned immediately when the same are presented for execution and no delay shall be allowed;

(j) the defendant shall execute a trust deed in favour of the plaintiff that Lot 199 is held by them as trustee of the plaintiff for the interim period of six months from the date [9 August 1990]; and

(k) past rental income shall be credited to the Old Jurudaya account.

The term 'Old Jurudaya' was used to describe the defendant company as at the date of the meeting and before.

[5] It is the contention of the plaintiff that the minutes of the meeting held on 9 August 1990 is a binding agreement by virtue of the words *irrevocable, conclusive* and *there shall be no further disputes* appearing therein. learned counsel for the plaintiff, Mr Victor Ng draws support for this contention premised on the word *irrevocable* which has been defined as *Unalterable; committed beyond recall* in *Black's Law Dictionary* (7th Ed), *Wan Salimah bte Wan Jaffar v Mahmood bin Omar (Anim bte Abdul Aziz, Intervener)* [1998] 5 MLJ 162, *Ooi Boon Leong & Ors v Citibank NA* [1984] 1 MLJ 222 and the fact that Datuk Mazelan bin Bugo (DW1) had agreed to the following during cross-examination (NOP/96 lines 3–12):

(a) The 1990 distribution agreement has recorded the entire contents of the 1990 meeting;

(b) That he fully understands the contents of the minutes;

(c) That he fully understands the obligations of the parties involved;

(d) That he had indicated his full and unconditional acceptance of the terms of the agreement by signing the minutes of the Mee The 1990 Distribution Agreement has recorded the entire contents of the 1990 meeting.

[6] With due respect to the learned counsel for the plaintiff, I am afraid his submission above pertaining to what DW1 testified in cross-examination at NOP/96 lines 3–12 is not accurate. I wish to point out the following:

(i) that although DW1 agreed the 1990 distribution agreement has recorded the entire contents of the 1990 meeting but he qualified it by saying *but it has been made void by another agreement between myself and Cheu Kuok King*; and

(ii) DW1 did not say he agreed 'that he had indicated his full and unconditional acceptance of the terms of the Agreement by signing the minutes of the meeting. The 1990 distribution agreement has recorded the entire contents of the 1990 meeting; in fact he replied, *A: I have signed there but after that I realised that it was not a very good deal for me.' to the question 'Q: In fact you had indicated your full and unconditional acceptance of the terms therein by signing the Minutes of Meeting. Is that not true?*

[7] I am of the view that the minutes of the meeting recorded on 9 August 1990 is not a binding agreement but as pointed out by the learned counsel for the defendant, Mr James Lo, is rather *an accurate record of the distribution arrangement reached between the parties*. In fact, PW3 stated in examination-in-chief (para 4 of WSPW3), *The purpose of the meeting was to discuss the distribution of the defendant's assets in view of the fact that the previous two directors and shareholders, the plaintiff and Chang Yi Ping were retiring from the defendant.* It is true that the parties, Chang Yi Ping, the plaintiff and DW1 signed the minutes of the meeting but in my view this does not go so far as to construe the distribution arrangement as a contract which is irrevocable. I find support for this view in the excerpt from *Black's Law Dictionary* (cited by the plaintiff's counsel) because as aptly pointed out by the learned counsel for the defendant, *the word 'irrevocable' is used in the context of 'irrevocable guaranty', 'irrevocable letter of credit', 'irrevocable offer', 'irrevocable power of attorney' and 'irrevocable trust' 'but, importantly, not irrevocable contract*. This is logical because although a contract cannot be revoked unilaterally (otherwise it will be tantamount to a breach) it can always be revoked mutually in accordance with the principle of freedom of contract where parties are entirely free to decide what terms they desire to contract if one is to assume that the minutes of the meeting is indeed a contract (which I find it is not) (see *Ooi Boon Leong & Ors* at p 226). In any event, the plaintiff's submission on the binding effect of the 'distribution agreement' (as termed by the plaintiff counsel) is not an issue because the defendant's stance is, not that it was not bound, but rather there was no valid trust under the distribution arrangement and alternatively, even if there is a trust, it had been expressly or impliedly revoked in 1991. It is my view the case of *Wan Salimah bte Wan Jaafar* is not relevant because it involves a written agreement where parties signed and the defence of *non est factum* was raised, unlike the present case which can be distinguished on the facts.

[8] On 22 August 2005, the learned counsel for the defendant, Mr James Lo (prior to this the defendant was represented by Mr George Chapman and on 22 July 2005, the former took over) informed the court that the defendant is now taking the stance that it would not be necessary to formally tender the first trust deed in evidence and they would be relying on the oral testimony which has been given by the witnesses so far and further, the former solicitor could not trace the first trust deed to be stamped since it was returned to PW3. Therefore, the court is now concerned with only the second trust deed (I shall for purposes of this judgment refer to 'the trust deed' referred to by counsel for the defendant as 'second trust deed').

[9] From the evidence of PW3, he prepared the first trust deed which was drafted on the basis that Lot 119 has not been transferred to the defendant from WAB Keluarga Realty Sdn Bhd and it was sent to the defendant for execution on 28 August 1990 vide his previous firm's covering letter (exh D1, p 3). The first trust deed was executed without the common seal of the defendant and he could not remember why it was undated. Then he prepared the second trust deed on the basis that Lot 199 was certain to be transferred to the defendant; it was sent to the defendant for its execution on 11 April 1991 with a covering letter (exh P1, p 13) which the defendant duly executed with the defendant's common seal and returned copies of the same vide their covering letter 6 May 1991 (exh P1, p 19). PW3 in examination-in-chief said that after having prepared, sent and receiving the second trust deed back from the defendant after the due execution, he did not receive any queries or objections in respect of the two trust deeds. However, in cross-examination, he admitted that the defendant instructed him not to effect the transfer of Lot 199 to the plaintiff *until all outstanding liabilities attributable to the old management have been totally settled by all the previous directors* vide letter dated 22 January 1991 (exh D1, p 4) and *until all accounts [Old Jurudaya] are satisfactorily settled* vide defendant's letter 6 May 1991 (exh D1, p 19). PW3 said that he does not think that the Old Jurudaya's account had been settled by all the parties. According to PW3, he also prepared the memorandum of transfer instrument No L15717/1991 to effect the transfer of Lot 199 from WAB Keluarga Realty Sdn Bhd to the defendant (exh P1, pp 16–17); however initially he could not remember whether the date, 31 October 1991 in the memorandum of transfer was dated by him or not but later said that the figure 91 was his handwriting. PW3 stated that the date, 1 November, 1991 in the recital was written by him whilst the date, 1 November, 1991 in cl 1 was written by his clerk. He said that the memorandum of transfer was registered on 2 November 1991. When asked where he obtained the date, 1 November 1991 since the memorandum of transfer was dated 31 October 1991 and registered on 2 November 1991, PW3 stated, *the trust deed and the memorandum of transfer was supposed to be on the same date* (NOP/64 lines 18–20).

[10] It is the plaintiff's contention that the trust that has been created is one of a completely constituted fixed express private trust (in the form of an executory trust) and the plaintiff is seeking to enforce his rights thereunder. The reason for this contention is that it had required a further conveyance of the legal interest in Lot 199 held by the defendant (being both the settlor and trustee of Lot 199); nevertheless the defendant had an equitable interest in Lot 199 by virtue of the sale & purchase agreement dated 13 August 1990 that the defendant had previously entered between

WAB Keluarga Sdn Bhd (vendor) and defendant (purchaser); all that was left to do in respect of Lot 199 was for the memorandum of transfer to be registered by the Kuching Land & Survey Department. For this reason, the trust is enforceable by the plaintiff against the defendant.

[11] The defence contended there was no valid trust created as the second trust deed was dated on 1 November 1991 but Lot 199 was not transferred to the defendant until 2 November 1991. Learned counsel for the defendant submitted that on the authority of the Court of Appeal case of *Koperasi Wanita Sarawak Bhd & Anor v Robert Sim Teck Hock* [2005] 4 MLJ 493, which held a trust is only valid if the title to the property is vested in the trustee completely, the alleged declaration of trust is ineffective, null and void because Lot 199 had not vested in the defendant completely at the time of the second trust deed.

[12] In *The Modern Law of Trusts* by David B Parker and Anthony R Mellows (4th Ed, 1979) (cited by plaintiff's Counsel), in answering the question of whether the beneficiaries can enforce the trust, the learned author stated at p 41:

> [T]he most important point is whether or not the trust has been completely constituted, i.e. whether it has been perfectly created. If it has, it will be enforceable by the beneficiaries against the trustees and, moreover, will be binding upon everyone with the exception of a bona fide purchaser of the legal estate for value. A trust which has not been perfectly created cannot operate as a trust; it will only be enforceable as a contract to create a trust, and to be enforceable as such it requires consideration from the beneficiaries. Equity will not assist a volunteer.

[13] Learned cCounsel for the plaintiff attempted to distinguish *Koperasi Wanita Sarawak Bhd & Anor* on the ground the trustee there had no title, right or interest at all in the subject land in law or in equity; all the trustee did was it made an application to the relevant authorities for alienation of the land whereas the plaintiff has an equitable interest in Lot 199. To bolster his argument the learned counsel then submitted from a passage found on p 43 of *The Modern Law Of Trusts* that:

> [T]he important rule in the law of trusts is that if the subject matter of the trust is legal interest in a property, the transferor must do everything that he can do to render it completely constituted. The same rule applies to the transfer of an equitable interest. It is not, of course, necessary for the trustee to procure a conveyance of legal interest, all that it is necessary is that they should make a perfect assignment of their interest. This covers situations where a trustee of an equitable interest has done all that he can do at that juncture in time.

[14] Learned counsel further submitted in this instance, the conveyance of the legal interest in Lot 199 was therefore subjected to mere procedural formalities as the memorandum of transfer was executed on 31 October 1991; what was remaining was the registration of the transfer of Lot 199; it is beyond the control of parties that the registration was only formally recorded by the Kuching Land Registry Office on 2 November 1991.

[15] With regret, I cannot agree with the learned counsel for the plaintiff. Firstly, if one is to peruse p 43 of *The Modern Law Of Trusts*, immediately preceding the reference to the rule referred to by learned counsel for the plaintiff, it is stated *the foregoing cases are illustrations of the important rule…* and the cases of *Re Fry* [1946] Ch 312; *Re Rose* [1952] Ch 499 and *Re Vandervell's Trusts (No 2)* [1974] Ch 269 referred to by the learned author are cases pertaining to shares (see pp 42 and 43). It is to be remembered that the form of transfer of a property declared to be held on trust depends on the nature of the property as was stated in *Koperasi Wanita Sarawak Bhd & Anor* which I will revert to hereafter. Further it is to be noted that at p 42 (top) the learned author stated:

> If the subject–matter of the trust is a legal estate or interest *the transfer must be effective to vest such estate in the trustees.* This has the consequence that a settlor must comply with all the formalities required for a complete transfer of the property in order that the trustees have a full legal title to it. Thus if land is the subject- matter of the trust it should be conveyed by deed. [Law of Property Act 1925, s 25] (Emphasis added.)

[16] In *Koperasi Wanita Sarawak Bhd & Anor* the relevant facts are the first appellant had applied by letter of application to the relevant authorities for the alienation of 36 acres of land ('the land'). In the application letter to the relevant authorities for alienation of the land the first appellant declared itself as the trustee in trust for the parties in the trust deed ('the trust deed'). The respondent had a 15% beneficial interest. There was no consideration paid by the respondent to the first appellant for his beneficial interest. It was stated in the trust deed that the first appellant will at the request and costs of the beneficiaries named therein transfer their respective shares upon alienation of the land. At the material time when the trust deed was executed the land was yet to be alienated by the authorities to the first appellant. The land was only alienated to the first appellant some three years later (see headnotes at p 493). The Court of Appeal held the trust deed was an incompletely constituted trust. His Lordship Abdul Kadir Sulaiman JCA (as he then was) at p 498 paragraph H-I till p 499 paragraph A–B opined:

> When the trust deed was created …the first appellant had no title, right or interest in the land. The first appellant had only made an application by letter [for alienation of the land]. A mere application letter does not create any title, right or interest in the land. The land was only alienated to the first appellant … more than three years later. A trust is only valid *if the title to the land is vested in the name of the trustee*,... the first appellant, which was not the case then. There a declaration by the first appellant under the trust deed …that it holds the land on trust for the respondent and the other eight beneficiaries when the first appellant then had no title at all to the land is ineffective and invalid in law and in equity. It is an incompletely constituted trust. It is settled law that the courts will not enforce an incompletely constituted trust (emphasis added).

[17] The aforesaid *ratio decidendi* was reached after His Lordship Abdul Kadir Sulaiman JCA (as he then was) at p 499 paras C–F referred to *Hanbury & Martin Modern Equity* by Professor Jill E Martin (16th Ed, 2001) at p 69 as follows:

> A trust is only valid if the title to the property is in the trustee and if the trust have been validly declared. A declaration that A holds on trust for B is ineffective if the property is not vested in A. The trust becomes constituted and valid when the property is vested in A.

> The form of transfer to A depends on the nature of the property — land, chattel, money, shares in a company, copyrights, patents, debts or other choses in action — and the appropriate method must of course be used. In the case of a trust of land there must also be written evidence of the declaration of trust. The settlor may of course declare himself trustee, and there is then an automatic constitution, because title was in the settlor throughout.

[18] Then at the same page in paras H–I till p 500 para A, His Lordship opined on the law on trusts by transfer by quoting from *Milroy v Lord* [1862] 4 De GF & J 264 at pp 274–275; 45 ER 1185 at pp 1189–90:

> In the case of *trust by transfer*, a further step is required to completely constitute the trust…[I]n order to render a voluntary settlement valid and effectual, the settler (sic) must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purpose of the settlement or declares that he himself holds it in trust for those purposes; … (Emphasis added.)

[19] At the same page of the report His Lordship opined that the case of *Milroy v Lord* was applied and followed by the Supreme Court in the case of *Yeong Ah Chee v Lee Chong Hai & Anor and other appeals* [1994] 2 MLJ 614 at p 624 and I quote the passage as follows:

> The three essentials of a valid trust are: (a) certainty of words; (b) certainty of subject; and (c) certainty of object. Looking at the seven trust deeds except for that in Civil Appeal No 5, there is certainty of words and also there is certainty of object, ie the names of beneficiaries, but there is no certainty of subject, ie trust property, viz the lands, because the beneficial ownership of the lands passed to the purchasers of those subsidiary agreements of sale and purchase in 1969 when the sale of these lands took place ie before the trust deeds were executed. The Lee brothers, named as the trustees of these deeds, were also the settlors of the trusts created by those trust deeds. It is a rule that a settlor must vest the trust property (subject) in the trustee completely, please see *Milroy v Lord. How could the settlors* (the Lee brothers) *vest the lands in themselves as trustees when, at the time of signing the trust deeds, they were not owners of the lands both in law and equity as well?* Please see *Lysaght.* (Emphasis added.)

[20] Premised on the authority of *Koperasi Wanita Sarawak Bhd & Anor* and the authorities therein which I have alluded to above, I hold that firstly, the purported trust was not one by transfer, rather as submitted by the learned counsel for the plaintiff was created by declaration; secondly, apart from certainty of words (as evident from the second trust deed) and certainty of object (ie, the name of the beneficiary) there is an absence of one of the three prerequisites of a valid trust ie, there is no certainty of subject. Based on the evidence from PW3, the common solicitor who prepared the second trust deed, it is undeniable that whilst the second trust deed was dated 1 November 1991, the memorandum of transfer was dated 31 October 1991 and registered on 2 November 1991 and he could only account for the difference in the dates by saying *the trust deed and the memorandum of transfer was*

supposed to be on the same date. The difference in the date in the second trust deed and the memorandum of transfer is crucial. It means that on 1 November 1991 the defendant was not the registered owner of Lot 199 yet as the registration of the memorandum of transfer only took place on 2 November 1991, albeit a difference of only a day. Since Lot 199 has not been vested in the defendant completely at the time the second trust deed was created, I find it follows that the second trust deed was not completely constituted and thus I agree with the submission of the learned counsel for the defendant that the purported declaration of trust is ineffective, null and void.

[21] Learned counsel for the defendant has submitted that the dating of the trust deed on 1 November 1991 by PW3 (the common solicitor for the plaintiff and defendant who drew up the first trust deed and the second trust deed) was an unauthorised and an invalid act because it was contrary to express later instructions not to effect the trust yet. It is patently clear that PW3 had no instructions to effect the transfer of Lot 199 to the plaintiff as is apparent from his evidence as follows:

(i) in examination-in-chief —

> After having prepared, sent and receiving the second trust deed back from the defendant after their due execution, I have not since received any queries or objections from the defendant in respect of the two trust deeds. (paragraph 8 of WSPW3); and

(ii) cross-examination —

> Q: At the bottom of paragraph, you testified that you did not receive any queries or objection from the defendant company. Did the defendant company instruct you not to effect the transfer to Cheu Kuok King until all issues and the Old Jurudaya accounts are fully settled?
>
> A: Yes.
>
> Q: (exh D1/4 referred). Is this the letter of instruction by the defendant company to you?
>
> A: Yes
>
> Q: (exh D1/19 referred). Is this also the letter of instruction by the defendant company to you?
>
> A: Yes
>
> Q: Was all the Jurudaya accounts settled by the all the parties?
>
> A: I do not think so.

[22] Exhibit D1/4, a letter dated 22 January 1991 was admitted by PW3 as a letter of instruction from the defendant signed by Poh Lik Gan (director of the defendant company) to him not to transfer Lot 199 to the plaintiff, inter alia, on the following terms *until all outstanding liabilities attributable to the old management have been totally settled by all the previous directors. In that event the trust deeds may be effected.* exh D1/19, a letter dated 6 May 1991 was admitted by PW3 as another letter of

instruction that, … *you are hereby instructed NOT to effect any transfer to Cheu Kuok King for all the right title share and interest until all accounts are satisfactorily settled.*

[23] In the light of the aforesaid evidence, it cannot be denied that when PW3 dated the second trust deed 1 November 1991, he did it against the express instructions of the defendant. Therefore, I am persuaded by the submission of the learned counsel for the defendant when seen in this light, the dating of the trust deed (second trust deed) on 1 November 1991 was an unauthorised act and is therefore invalid.

[24] At this juncture, I find it necessary to refer to the passage from *Hanbury & Martin Modern Equity* quoted in *Koperasi Wanita Sarawak Bhd & Anor* at p 499 paras G–H as follows:

> Although no trust is created unless the trust is completely constituted, there are situations where intended beneficiaries under an incompletely constituted trust may compel the transfer of the property to the trustees. In general, they can do so if they have given consideration, but not if they are volunteers, for there is yet no trust and equity will not assist a volunteer.

[25] The same principle is echoed by the learned author of *The Modern Law Of Trusts*:

> A trust which has not been perfectly created cannot operate as a trust; it will only be enforceable as a contract to create a trust, and to be enforceable as such it requires consideration from the beneficiaries. Equity will not assist a volunteer (see p 41) and 'A person is not a volunteer if (i) he has given valuable consideration in the common law sense, eg money or money's worth, or (ii) he is within a marriage consideration (see p 46).

[26] Similarly in para 90.048 of *Halsbury's Laws of Malaysia* Vol 5, 2000 Ed (cited by defendant's counsel) it is stated:

> *There cannot be a trust of future property, as there would be a trust of nothing at all. It is immaterial whether the settlor makes a purported voluntary assignment of future property to trustees on declared trusts or whether he purports to declare that he himself is holding future property on certain trusts. If the future property subsequently materialises into existing property, the intended beneficiaries have no enforceable claim to it. However, if the settlor had received valuable consideration for creating a trust of future property then, once the future property materialises into existing property, equity treats the settlor as holding the property on trust for the beneficiaries. As he received consideration his conscience is bound so that on becoming at last entitled to specific property, he may not claim to retain it for himself.* Future property includes the interest which a person hopes to take under the will or intestacy of a living person or under the exercise of a special power of appointment, future royalties, future book debts, freight not yet earned, copyright in songs not yet written, dividends not yet declared, the proceeds of any future sale of specific property and damages which may be recovered in pending litigation. It does not include existing vested or contingent rights to obtain property at some future time, for example B's interest where property is settled on A for life, remainder to B if he attains 35 years and is alive on A's death. (Emphasis added.)

[27] It will be observed that the aforesaid principles are encapsulated in the cases of *Yeong Ah Chee and Lee Eng The & Ors v Teh Thiang Seong & Anor* [1967] 1 MLJ 42 referred to in *Koperasi Wanita Sarawak Bhd & Anor*. Thus, in the light of the authorities in the instant case the court has to determine whether the plaintiff is a volunteer and whether Lot 199 is future property.

[28] Learned counsel for the defendant contended alternatively, no valid trust could have been declared since the plaintiff himself has not carried out the conditions of the distribution arrangement entitling him to the property in particular the plaintiff did not pay Chang Yi Ping the sum RM82,622 within six months from the date of the distribution arrangement (9 February 1991), even until today and also has to pay 30.7% of Old Jurudaya's liabilities in the sum of RM119,228. In support learned counsel relied on the case of *Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd* [2005] 4 MLJ 101 where the Court of Appeal held, by majority decision, that an unambiguous undertaking cannot be resiled from and the failure to comply with a condition precedent meant that the defaulting party would be in breach of contract. The plaintiff does not subscribe to this contention.

[29] It would be appropriate now for me to refer to the submission of the learned counsel for the plaintiff that DW1 had admitted the question of whether the plaintiff had paid Chang Yi Ping the sum of RM86,622 was not on trial in this Suit. I agree with the learned counsel for the defendant that the suggestion put to DW1 was in the negative: *The question of whether plaintiff had paid Chang is not on trial in this suit, is it?*and the answer *No* means the witness disagreed with the suggestion, besides DW1 explicitly said, *[I]it is definitely related to the suit*.

[30] The plaintiff admitted in cross-examination that he did not pay Chang Yi Ping, the reason being *This is the agreement between me and Chang Yi Ping. Only after I settle the shophouse with Jurudaya that is Lot 199 then I should be able to raise money to pay Chang Yi Pin* (NOP11 lines 9–13). Chang Yi Ping was not called as a witness by the plaintiff because he has migrated to Australia; in any event the reason for not paying is immaterial since the fact remains that there is an admission by the plaintiff he has not paid. It is not disputed that the plaintiff also did not settle his liabilities constituting 30.7% of Old Jurudaya's liabilities in the sum of RM119,228 and in fact appeared to give an excuse of sorts, *A: I never received any statement regarding the liabilities from Jurudaya so how to settle?* (NOP 8 lines 15–18). I agree with the submission of the learned counsel for the defendant there was a failure of consideration on plaintiff's part as the intended beneficiary and he cannot now seek the court to exercise its equitable jurisdiction when he has not come with clean hands for not fulfilling the conditions precedent based on the case of *Silver Concept Sdn Bhd*. In my judgment, the argument of the learned counsel for the plaintiff that *Silver Concept Sdn Bhd* cannot be relied by the defendant as the defendant itself is in default/breach of the conditions for not settling the charge-in-escrow within six months and for not paying all rental income derived from Lot 199 with effect from 9 August 1990 cannot be sustained. It is to be noted in this regard the defendant is not seeking any relief from the court whatsoever and has abandoned its amended counterclaim. Based on the law and the evidence, I find the second trust deed was

incompletely constituted and the plaintiff was a mere volunteer. Therefore, the court will not render assistance to a volunteer in the case of an incompletely constituted trust. A

[31] With due respect to the learned counsel for the plaintiff, in my view, his submission that the plaintiff has a vested right over Lot 199 by virtue of the 1990 distribution arrangement and the trust in the present case is over the plaintiff's existing vested rights to obtain Lot 199 at some future time is incorrect. It is clear from the passage from paragraph 90.048 of *Halsbury's Laws of Malaysia* Vol 5, 2000 Ed (as emphasised above) that the question of future property has to be viewed from the context of whether a trust can be perfectly created or completely constituted as submitted on behalf of the defendant. Further, although I agree as submitted by the learned counsel for the defendant the question whether something is 'future property' is to be determined in the hands of the trustee, not the beneficiary, I wish to add rather it is to be determined by the settlor who in certain circumstances may be the trustee also. B C D

[32] In the event my finding that there was no valid trust created is wrong, I now turn to the defence that if there is a valid trust, the same was expressly or impliedly revoked by the subsequent agreement of 17 September 1991 (comprising the first and second agreements). Learned counsel for the plaintiff has resorted to the use of recitals as an aid to the construction of the first and second agreements relying on*Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 779 on the ground there is ambiguity of contract. Following that it is submitted on behalf of the plaintiff that the true purpose of the first agreement: E

> ... is to clarify that the plaintiff was desirous to retire from the defendant and also to cease to take part in the business of the defendant. Furthermore, there would appear to be doubts arising around the material time as to whether the plaintiff is to be additionally liable to the creditors of the Company or to some of them for or in respect of the debts or liabilities of it or some of them. F

Whilst the purpose of the second agreement: G

> … is to express in writing the sale and transfer arrangement of the shares in the defendant that the plaintiff was holding previously.

[33] Further, the learned counsel for the plaintiff urged the court to adopt *the business common sense approach* following *Luggage Distributors (M) Sdn Bhd* and the *reasonableness of result* test based on *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2001] 1 MLJ 324. H

[34] Based on the chronological flow of events and the evidence of DW1 as to how the first and second agreements came about which will be shown hereafter, I am incline to agree with the submission of the learned counsel for the defendant that there is no ambiguity in the words, *[the plaintiff] waives all rights to the assets of [the defendant]*; thus it would not be proper to impose an interpretation which is contrary to an express condition which can be read literally. I

[35] DW1 in examination-in-chief had said that the defendant has been suffering operating losses over several preceding years and its balance sheet was barely in a positive asset position and without Lots 199 and 203, the balance sheet would be in the negative. The profit and loss account in the defendant's audited accounts for the year ending 30 June 1989 (exh D3, p 7) showed that the net loss before taxation was RM204,303 and the accumulated losses brought forward was RM746,106; the total loss position was RM950,409; the plaintiff was aware of this audited accounts since he has signed the director's declaration. Based on the balance sheet (exh D3, p 6) the substantial liabilities were only off-set by fixed assets valued at RM914,202 which comprised of the two shophouses Lot 199 and Lot 203 valued at RM709,788 as evident from note 2 of exh D3, p 9. DW1 said that he began to feel concerned that the agreement reached on 9 August 1990 was not fair and equitable because the plaintiff was going to receive Lot 199 (estimated at RM500,000), shares in a company called Madaya Holding Sdn Bhd (estimated at RM60,000) and a Nissan vehicle (estimated at RM26,000) (exh P1, p 5), the total aggregate value is approximately RM586,000 to exceed a negative value company. Further, DW1 stated that since the plaintiff has not fulfilled the condition to receive transfer of Lot 199 as he has not paid Chang Yi Ping the sum of RM82,622 within the stipulated time of six months from 9 August 1990, he began to have doubts that the plaintiff would be able to pay the liabilities of Old Jurudaya. In addition, DW1 testified that around the middle of 1991, the defendant was struggling to find jobs because it had been blacklisted in 1998 by the Department of Drainage & Irrigation ('DID') for substantially defaulting on a job as evident by a letter from DID dated 21 June 1998 suspending the registration of the defendant which was copied to the State Financial Secretary, JKR Sarawak and all the Jurutera Parit dan Tali Air throughout Sarawak (exh D3, item (1)). The plaintiff knew of the blacklisting by DID because it arose from a job in the Miri Pujut Lopeng area handled personally by him. As a result of this, DW1 stated that he called the plaintiff to tell him frankly his doubts concerning the values of shares which the plaintiff was transferring to him and told the plaintiff that since he has not fulfilled the condition entitling him to transfer Lot 199, he (DW1) would be prepared to pay him (plaintiff) a sum of RM44,000 on top of the Madaya and Nissan shares which had been transferred provided the plaintiff waived all claims to all assets of the defendant. The plaintiff agreed and on 17 July 1991 signed the first Agreement (exh D1, pp 21–23) together with the Indemnity to him for his 30.7% shares of the liabilities of the Old Jurudaya (second agreement). According to DW1 after the first and second agreements were signed, the defendant's accountant came up with the management account for Old Jurudaya on 30 September 1991, showing total liabilities of RM388,365 (exh D1, pp 26–29) which statement had been signed by the plaintiff, Chang Yi Ping and DW1; the plaintiff's 30.7% shares of liabilities came to RM119,228 which remained unpaid. According to DW1 by virtue of the first and second agreements the aggregate value which the plaintiff has enjoyed at the expense of the defendant and his fellow shareholders is actually more than RM330,000 which comprised of RM130,000 cash and assets (RM44,000 + RM60,000 + RM26,000) and the plaintiff has not been paying the defendant and Chan Yi Ping about RM200,000 (RM82,622 + RM119,228 respectively). DW1 also said that the first and second agreements were more than fair and equitable to the plaintiff since the defendant was not a valuable company and it would be unjust and inequitable to the defendant if the original distribution arrangement had been carried out without variation because the plaintiff

would be receiving RM586,000 worth of assets and an additional cash of RM44,000 whilst the plaintiff would be leaving the new shareholder, Poh Lik Gan and him to shoulder the burden of debts in excess of RM388,000 (exh D1, p 29).

[36] The plaintiff has submitted that the sum of RM44,000 paid to him was for profits, dividends, etc of the defendant due to him as a shareholder. In cross-examination, DW1 has replied that it was true only if the defendant-company made money whereas here, the defendant has accumulated losses of RM962,943, therefore there could have been no profits or dividends due to the plaintiff. Further, as to the allegation of the plaintiff that DW1 only agreed to waive assets not listed in the 'distribution agreement' ie, office equipment, air-con, furniture and profits accruing to the defendant between the date of the 'distribution agreement' (9 August 1990) and the date of the first and second agreements (17 July 1991), DW1 had testified that such office equipment were not valuable and the defendant's massive liabilities would have wiped out the marginal value of its furniture and fittings. On the facts and evidence, I find that there is no valid trust created because the subsequent agreement signed on 17 July 1991 varied or superseded the 1990 distribution arrangement and/or the same has been expressly or impliedly revoked by the subsequent agreement signed in 17 July 1991 whereby the plaintiff waived all assets of the defendant including Lot 199. Therefore, it follows that there is no necessity for the court to consider the prayer of plaintiff's claim for rental proceeds and/or damages.

[37] To conclude in the circumstances of the case, on a balance of probabilities, I find that:

(i) there is no valid trust created under the distribution arrangement reached at the meeting held on 9 August 1990;

(ii) alternatively, even if there is a valid trust created (which I do not agree), the subsequent agreement signed on 17 July 1991 varied or superseded the 1990 distribution arrangement and/or the trust if created was expressly or impliedly revoked by the subsequent agreement on 17 July 1991.

[38] The plaintiff in examination-in-chief stated that he has lodged a caveat against Lot 199 claiming beneficial interest by virtue of the trust deed (plaintiff is in fact referring to the second trust deed). This is evident from the land search result found in exh P1 at pp 3 and 4, in particular at p 4 which shows that a caveat was lodged by the plaintiff vide L 17969/1991 of 14 December 1991 at 1157 hours. As I have made a finding that the declaration of trust by the defendant pursuant to the second trust deed upon which the plaintiff claimed a beneficial interest was not completely constituted and is therefore ineffective, null and void and further that the plaintiff was a mere volunteer. It therefore follows that the plaintiff's claim of his beneficial interest in Lot 199 and the entry of the caveat thereon is obviously unsustainable and the caveat ought to be removed forthwith.

A **[39]** For the foregoing reasons, the court dismisses the plaintiff's claim with costs to be taxed unless otherwise agreed and with a consequential order that the caveat lodged by the plaintiff over Lot 199 be withdrawn forthwith.

Plaintiff's claim dismissed with costs to be taxed.

B

Reported by Sally Kee

C

D

E

F

G

H

I